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IN THE

Supreme Court of the United States

October Term, 1957.

No. 141.

HOWARD D. ABRAMOWITZ,

Petitioner,

vs.

WILLIAM M. BRUCKER,

Respondent.

No. 80.

JOHN HENRY HARMON, III,

Petitioner,

vs.

WILBER M. BRUCKER, etc.,

Respondents.

BRIEF FOR SERVICEMEN'S DEFENSE COMMITTEE AS AMICUS CURIAE.

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BRIEF FOR SERVICEMEN'S DEFENSE COMMITTEE AS AMICUS CURIAE.

Preliminary Statement.

This brief is being submitted on behalf of a group of young American citizens who, for purposes of mutual aid and protection, have organized themselves into an informal organization known as the "Servicemen's Defense Committee". All of the members of this Committee will be directly or indirectly affected by the decisions of this Honorable Court in the above-entitled

matters. The impact of these decisions upon them will not be slight. The future course of their entire lives will be freer and more secure or will continue under severe and permanent handicap, all dependent upon the outcome of this litigation. It is this personal interest in the outcome of these cases, together with the belief of *amicus curiae* that it may be of some assistance to the Court in resolving the questions presented in these cases that has led to their securing the consent for the filing of this brief.

All of the members of the Committee were drafted into the Armed Forces of the United States within the past seven or eight years. Each of them possesses an excellent record of military service. Yet, each of these young men was separated from service with an undesirable discharge. These discharges have plagued every one of them in one manner or another and have resulted in the denial of benefits to them which other young men who served their country well have received and are receiving.

In each case the reason for the discriminatory treatment accorded to these men is substantially the same. Subsequent to induction each of them was requested to fill out a form stating whether or not he had ever been a member of or associated directly or indirectly in any manner whatsoever with any of the organizations which had been listed as subversive, Communist or Fascist by the Attorney General of the United States. Like all other inductees these men were advised that they had the right to refuse to answer these questions on the grounds that their answers would compel them to be witnesses against themselves, thereby entitling them to the protection of the Fifth Amendment. There was no intimation that the

exercise of the constitutional right thus proffered could result in punishment of the individuals involved. Each of these young men refused to answer the questions thus put relying upon their constitutional privilege.

Thereafter proceedings were instituted against them by virtue of letters of allegations, which letters set forth the grounds on which it was asserted each individual was subject to discharge from service under conditions other than honorable. The claim of the Fifth Amendment privilege appeared in these letters of allegations as one of the grounds which might subject the individual to the punitive action indicated. All of the other grounds in each instance consisted of pre-induction activity of a completely legal character, all within the area of belief, speech and association protected by the First Amendment. The allegations extended to such conduct not only of the individual directly involved but of his parents, relatives and friends. In most instances there was an allegation of pre-induction Communist Party membership generally several years prior to the induction date, but in no instance was there an allegation that the membership was related to either unlawful activities or scientur of evil purpose. Other allegations refer to attendance at meetings of organizations such as the California Emergency Defense Committee and the National Council of American-Soviet Friendship, both cited as subversive and Communist by the Attorney General of the United States. Membership in organizations such as the Progressive Citizens of America at a time when it was a part of a party on the ballot in the State of California[1] (but

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[1]*Cf. Konigsberg v. State Bar*, 353 U. S. 257; *Sweezy v. New Hampshire*, 354 U. S. 234.

which was cited by the California Committee on Un-American Activities as subversive), and membership in similar organizations were typical of items included in the allegations. The signing of petitions addressed to the legislature and to the executive branch of the government, opposition to some aspects of the foreign policy of the United States, and similar expressions of ideas were likewise included therein.

Upon the basis of such letters of allegations hearings were held for each of the individuals involved before Army Boards, at which hearings the Boards considered as evidence against each of these young men a secret file which neither he nor his counsel was allowed to see. No witnesses were produced against any of them and each was denied confrontation of witnesses and the opportunity of cross-examination. The young men involved denied that they believed in or had ever advocated force and violence or had belonged to an organization which to their knowledge so advocated. They denied that they had engaged in any illegal or improper activities either as civilians or otherwise. In each instance evidence was introduced both from the military superiors of the individuals involved and their co-enlisted men bespeaking the excellence of the service they rendered while members of the Armed Forces. In each instance objections to the proceedings upon grounds which will hereinafter be indicated were made. Without exception these young men received undesirable discharges, each of which has been sustained after review by the Army Discharge Review Board upon the basis of the record which had been made before the Army Board, including the secret record to which access was denied to the individual involved and his counsel at all stages.

The excellence of the service of some of these men and their superior qualities received specific recognition from superiors high in rank.[2] Their discharges have resulted in deprivation of the benefits of the "G.I. Bill", and this in turn has made it impossible for certain of them to pursue their education. Others desire to follow professional careers—one or two as lawyers. The nature of their discharges constitutes a serious blemish upon their good character which may present obstacles to their admission. Indeed the discharges of all have placed them under a cloud which adversely affects both economic and social opportunity.

In each of the cases the following objections were raised at all stages of the proceedings:

1. The long delays of the Armed Services in processing the cases of the alleged security risks and the timing of the discharges so as to require virtually full service but to assure separation prior to the regular date thereof, together with the positions of responsibility entrusted to and faithfully carried out by these individuals indicates that the purpose of the discharge in each case was not the security of the Armed Forces but that of imposing punishment upon the individuals involved for their alleged nonconformity.

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[2]For example, on July 9, 1954, there was a request for a waiver of time in order to promote one of these men to corporal, made by the Lt. Col. under which he was serving with the following statement: "Subject has on occasion assumed the duties of the battalion sargeant major and the consistency of the superior work produced by him definitely indicates an ability to perform duties required of a position higher than E-4." This man was nevertheless kept in the lowest possible rating, while he continued to perform duties of high responsibility, until he was ousted by an undesirable discharge from the Armed Forces shortly before his regularly scheduled discharge date.

2. In each case the individuals were punished because of their alleged ideas and associations contrary to the guarantees of the First Amendment.

3. In each case the guarantees of the Fifth Amendment were violated by imposing punishment for the claim of the privilege which both the Constitution and the Armed Forces had guaranteed.[3] As a matter of fact the proffer of the privilege together with the subsequent punishment for the claim raises serious questions of entrapment.

4. The nature of the proceedings violated the constitutional provisions against bill of attainder and *ex post facto* proceedings. In each instance the conduct complained of was legal at the time it was allegedly engaged in. It was thereafter declared to be a basis for punishment of those young men who were required by the law of this country to enter its armed forces and serve therein.

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[3]On February 1, 1955, Secretary of the Army Robert T. Stevens wrote to Sen. Joseph R. McCarthy in part as follows: "Your letter also suggests that Bielski, an inductee, be given a dishonorable discharge because he invoked the Fifth Amendment before he came in. In the absence of any evidence of subversive conduct, this would mean that a person who is forced into service by induction and required to serve two years must look forward at the end of this obligated service to a dishonorable discharge merely because he has availed himself of a right guaranteed by the Constitution no matter how well he shall have performed his assigned duties. Aside from legal considerations, such a policy in terms of morale and discipline in the armed forces would be most impracticable. Furthermore, from a legal standpoint, I am advised that this is untenable and would be in direct conflict with the recent pronouncements of the Supreme Court on this very subject. . . . ." Nevertheless, the Armed Forces continued thereafter to include in allegations leading to undesirable discharges the fact that the privilege of the Fifth Amendment had been claimed.

5. The proceedings violated the due process guarantees of the Fifth Amendment in each of the following respects:

a. In each instance a presumption of guilt was substituted for the required presumption of innocence.

b. Punishment was predicated upon secret evidence never disclosed to the individual involved or his counsel.

c. There was a complete denial of confrontation and the right of cross-examination of witnesses.

d. The charges were vague and indefinite and demands for full particulars were denied.

6. The doctrine of separation of powers was violated by the proceedings in the following respects:

a. The military, a subdivision of the executive branch of the government, exercised legislative powers by adopting the regulations under which the undesirable discharges were issued, and judicial powers by conducting the trial of individuals charged with "subversive" civilian activities.

b. The Armed Forces have absolutely no power over the conduct and activities of civilians. It may not usurp such power by the device of exercising jurisdiction over a member of the Armed Forces in such a manner as to penalize him for conduct in which he is alleged to have engaged as a civilian. To give to the Armed Forces of the United States power of the kind here exercised is to vest it with control over the lives of civilians; for the power to punish for civilian activities is the power to control

these activities. The Armed Forces have delegated to themselves the right to say to the civilian youth of this land what organizations they may belong to, with whom they may associate, what they may read, what kind of parents they may live with, what kind of thoughts they may have, and what political parties they may join. This claim of power by the Armed Forces of the United States would substitute military control of civilian life for the civilian control of the Armed Forces contemplated by the Constitution of the United States.

It is with this last point that this *amicus* brief is concerned, all of the other points being adequately covered in the opinion of *amicus curiae* in the briefs filed on behalf of the petitioners. Its importance to this litigation is underlined by the observations in the main opinion in *Reid v. Covert*, 354 U. S. 1, that the President and his subordinates may well be exercising "legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." The brief which follows essays to demonstrate that when the military attempts to try its subjects for their preinduction, civilian conduct it exercises a blend of functions that gravely offends constitutional requirements of separateness.

The Application of AR 604-10 so as to Impose Punitive Discharges Upon Inductees, Based Solely on Their Pre-Induction Conduct as Civilians, Constitutes the Unconstitutional Exercise of Legislative and Judicial Power by the Military in the Area of Civilian Life.

For the reasons assigned in the petitioners' briefs the discharges issued them were punitive in effect and perhaps in design. These young men, like the ex-servicemen for whom your *amicus* speaks, were co-opted into the military service by operation of law. These are not volunteers, and in all cases their induction was involuntary if not contrary to their will. The conduct upon which the discharges were based occurred prior to their induction when they, or their relatives, or associates, were acting only in a civilian capacity in no wise related to any status, capacity or service encompassed within the "Armed Forces". See Uniform Code of Military Justice, Art. 1, sub. 2; Art. 2; 50 USCA 551, 552. The punishment affects them in civilian life far more than in military life. For upon receipt of the discharge the inductee is finished with military service. But the dishonorable discharge remains with him in civilian life to affect his employability or his admission into a professional career, and, in this fashion, a broad range of economic and social opportunity. It is not far fetched to say that such a discharge may constitute a turning point in the life of every inductee receiving one.

The question then is whether such inductees may be subjected by the military to punitive discharges for reason connected only with their pre-induction civilian conduct, association and family relationships. Aside from the contentions of petitioners themselves, and without gain-

saying a word of their arguments, we urge that the power here asserted by the military offends the constitutional doctrine of the separation of powers.

The Army acts under AR 604-10.[4] This document does not on its face recite any statutory or other authority. It is relevant however that the President and his subordinates are given certain general rule-making powers; they can prescribe rules and regulations for "the procedure, including modes of proof, in cases before courts —martial, courts of inquiry, military commissions and other military tribunals" (Arts. 36 and 140, Uniform Code of Military Justice, 50 USCA 611, 736). As to inductees such as petitioners, rule-making authority is conferred by the Universal Military Training and Service Act (June 24, 1948, c. 25, Title I, 62 Stat. 604, 50 USCA, App. Sec. 451 ff). There it is provided that inductees shall serve for a period of 24 months "unless sooner released, transferred or discharged in accordance with procedures prescribed by the Secretary of Defense . . ." (Sec. 4(b), 50 USCA, App. 454(b)) and that the President or his delegate is authorized "to prescribe the necessary rules and regulations to carry out the provisions of this title . . ." (Sec. 10(b) and (c), 50 USCA, App. 460(b) and (c)).

If AR 604-10 rests upon a statutory grant of rule-making authority, it would seem that the provisions just cited are its foundation. To construe and apply them so as to authorize the issuance of the punitive discharges on the grounds here involved is to treat them as delegat-

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[4]The text appears in *Government Security and Loyalty, A Manual of Laws, Regulations and Procedures*, Bureau of National Affairs (Washington) Chapter III, Military Personnel Security, pp. 31,71 ff.

ing to the military, legislative and judicial power reserved to the Congress and the courts under our Constitution. This is so as to legislative power because neither in the specific statutory clauses already adverted to, nor in the complex of statutes representing Congressional "rules for the government and regulation of the land and naval forces" (U. S. Const. Art. I, sec. 8, ch. 14) is there any declaration of policy or rule that persons once inducted into those forces may be punished by the military for civilian conduct. The delegation of judicial power is effected by the attempt to substitute a truncated administrative procedure for a judicial trial as the method of determining imposition of such punishment.

If, on the other hand, AR 604-10 purports to exercise inherent disciplinary powers it is an arrogation by the military of legislative and judicial power. It offends the Constitution in the same measure as just described but here without even the pretense of statutory authority. This is the military acting upon its own *ipse dixit*.

Deep in our institutions and traditions lie the reasons for the proposition that the powers of the military should be strictly confined to its own sphere, and subordinate to the civil authority. This Court has recently spoken of the three landmark cases manifesting "the deep-rooted and ancient opposition in this country to the extension of military control over civilians" *Reid v. Covert*, 354 U. S. 1. The cases there cited are *Ex parte Milligan*, 4 Wall. 2, and *Duncan v. Kahanamoku*, 327 U. S. 304, wherein assertions of martial law, outside the area of combat and while civilian administration and courts were still operating, were repulsed, and *Toth v. Quarles*, 350 U. S. 11, denying the military the power to try a dis-

charged serviceman for offenses committed while in service. The *Reid* case itself adds another such bench mark in vouchsafing to wives and children accompanying servicemen to foreign basis (even at the military's expense and living within the overseas communities created and administered by the military) the constitutional protections of judicial trial and due process.

Out of this history can be written at least this much logic—that it would take the most clear and unambiguous enactment by Congress to lead this Court to construe any statute as giving the military power to devise punishments and reprisals for civilian conduct. For to do this, as the petitioners' briefs so convincingly show, is of necessity to control civilian life to a marked degree. Not only will the employment, professional, economic and social lives of these victims of the military's punishment be forever blighted by the badge of infamy affixed to their records; but many thousands more, aware of the military's power, will before induction abstain from conduct and associations in all fields that actually or potentially run afoul of the military's interdiction. History and the inherent qualities of the military's action combine to require of the Congressional enactments a manifest intent to empower the military to adjudge civilian conduct, before it would be concluded that an attempt to confer such power had been made. No such power is so much as hinted at in any of the relevant legislation.[5]

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[5]Even were the statutes here capable of such a construction grave constitutional problems would be presented. Consistent with its usual practice this Court will refrain from a construction that needlessly presents constitutional difficulties. *United States v. Rumely*, 345 U. S. 41, 46.

1. AR 604-10 as an Exercise of Legislative Power.

Nowhere in the pertinent legislation is there a declaration by the Congress that persons whose civilian conduct only renders them potential "security risks" shall for that alone be visited with any punishment, sanction or reprisal. It is essential to a valid delegation of quasi-legislative power that there be from the Congress a declaration of a meaningful and definite standard which the executive may make effective upon finding the occurrence of certain facts properly found or proclaimed, *The Aurara*, 7 Cranch 382; *Marshall Field v. Clark*; 143 U. S. 649; or such a standard which as a practical matter can be stated only in general terms and the executive is to effectuate so as "to fill up the details" with application to specific facts, *Wyman v. Southard*, 10 Wheat. 1; *Buttfield v. Stranahan*, 192 U. S. 470; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; or such a standard which is realized by particular determination made upon an ascertainment and evaluation of manifold and changing fact situations. *St. Louis I. M. & S. R. Co. v. Raylor*, 210 U. S. 281; *Intermountain Rate Cases*, 234 U. S. 476; *Avent v. United States*, 266 U. S. 127; *N. Y. Central Securities Corp. v. United States*, 287 U. S. 12; *J. W. Hampton, Jr. & Co. v. United States*, 276 U. S. 394; *United States v. Rock Royal Cooperative*, 307 U. S. 533; *Opp. Cotton Mills v. Administrator*, 312 U. S. 126; *Yalues v. United States*, 321 U. S. 414; *American P & L Co. v. S. E. C.*, 329 U. S. 90; *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146. But absent the declaration of a rule of conduct or of an objective to be attained, the performance of the legislative function by the Congress is wanting and the law-making

power is delegated to the executive. *Schechter v. United States,* 295 U. S. 495; *Panama Refining Co. v. United States,* 293 U. S. 388.

Here on the question of imposing punishment (in military *and* civilian life) for civilian conduct there has been no rule of conduct enacted by the legislature, and no declaration of policy to be effectuated by any administrative process. On this the statutes are silent, and all in our traditions cries out to negate the implication of such a rule or policy from either Congressional pronouncement or the purposes and objectives of military service. To find such a rule or policy in the legislative grant of authority to prescribe "procedures" for release, transfer or discharge of inductees (50 USCA, App. 454(6)) or the warrant to "prescribe the rules and regulations to carry out" the Universal Military Training Act (50 USCA, App. 460(6)) would involve plain judicial legislation. The Uniform Code doubtless was designed to make possible an efficient and well-disciplined military establishment. But neither the power and machinery to conscript nor the authority to discipline those within the Armed Forces carries with it the power to adjudge individuals for their civilian conduct and penalize them in their civilian careers.

The *Schechter* case, *supra*, seems particularly apposite. There the Congress declared its policy in a broad and all-encompassing statement of aims and gave the executive full discretion as to whether to achieve them and the means to be used. There was enacted no rule of conduct to be achieved by specified means. There the executive was authorized to, and did, promulgate the rule of conduct; he set the objectives for various industries and the means of achieving them. His codes fulfilled the function

of the legislature. Here there is no rule of conduct or declaration of policy—none at all. To the extent that this be sought in the aim of maintaining effectiveness and discipline, this pertains to the military forces themselves, not civilians in civilian life. Here the executive has promulgated a code. Only in it are the rules of conduct and the policy and aims declared so as to apply to civilian conduct and to warrant punishment in civilian life. Here also it is the code, not the statute, which has prescribed the rule of conduct or policy.

Nor can the exercise of legislative power by the executive be justified for the reason that the executive acts for what he conceives to be the public good. The best of motives do not substitute for constitutional authority. *Panama Rfg. Co. v. United States, supra,* p. 420. The all-out campaign to expose and ostracize actual or putative communists and non-conformists as well as to subject them to grave economic privation may even from this vantage point in history appear to have been as irrational as it was destructive of essential liberty.[6] But, good or bad, these efforts must be undertaken consistently with the requirements of the Constitution.

On the other hand, and apart from rule-making powers conferred by statute, it has been stated that "Military Personnel Security, unlike other government screening programs, rests neither on Congressional enactment nor Executive Order but is based on the inherent disciplinary powers of the military organization.". (BNA Manual,

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[6]See *e.g., Konigsberg v. State Bar,* 353 U. S. 257; *Schware v. United States,* 353 U. S. 232; *Watkins v. United States,* 354 U. S. 178; *Sweezy v. New Hampshire,* 354 U. S. 234; *Yates v. United States,* 354 U. S. 298; *Wilson v. Loew's, Inc.,* Petition for Certiorari Pending No. 552, October Term, 1956.

supra, p. 31:1). A similar but more oblique suggestion was made by the court below. *Harmon v. Brucker* (C. A. D. C.) 243 F. 2d 613, 619, 620. Since under Art. I, sec. i, cl. 14 of the Constitution only the Congress can confer powers relating to the "government and regulation of the land and naval forces," the theory of inherent power can mean only that, taking as a whole the provisions of statutory law pertaining to the Armed Forces, they evidence a policy and objective of effectiveness and discipline which authorize AR 604-10. But the Uniform Code of Military Justice, as well as its predecessors, plainly show that both in the declaration of offenses and the prescribing of punishment specific Congressional enactment has always been regarded as essential. For always these documents have spelled out offenses and punishments with the specificity of a criminal code. And this has been for persons clearly in the Armed Forces and for conduct in a military connection.

In a case involving a charge of misconduct during an enlistment terminated by honorable discharge it was held that specific statutory authority would be required to try and punish the individual following a re-enlistment *Hirshberg v. Cooke*, 336 U. S. 210. *A fortiori* in the case of a man punished for civilian conduct. To hold otherwise would run counter to the fixed policy of strictly confining military power. "It it an unbending rule of law that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U. S. 712, 716, where the military was acting as a legally constituted occupying force after the end of hostilities in the Civil War. In *Duncan v. Kahanamoku*, *supra*, the military was denied authority to try civilians for civilian

offenses even during wartime and in a war theater, where civilian authority was still able and willing to function. See also *Reid v. Covert, supra.* We submit that there is no significant difference between military trials of civilians for civilian offenses and military trials of members of the Armed Forces for offenses, if such they were, committed while they were civilians and beyond military jurisdiction.

In this connection a sentence from Mr. Justice Minton's dissent in *Toth v. Quarles,* 350 U. S. at 44, is relevant. "A civilian not under the jurisdiction of the Military Code has a right to be tried in a civil court for an alleged crime as a civilian." That after the alleged offense the actor is inducted cannot change the situation. If a civilian committed murder before induction he could not be tried by a military court-martial merely because of his supervening induction. To hold otherwise is to go far beyond the meaning or implication of anything Congress has enacted. It would extend upon a mere technicality, to the military a long reach over the administration and control of civilian life.

2. AR 604-10 as an Exercise of Judicial Power.

Civilians who are to be punished for civilian offenses are entitled to judicial trials by Art. 3 courts. They are entitled to an examination of their case by a grand jury, trial by a jury, proper pleading of the charge and a tribunal presided over by a judge rendered as independent of all other branches of government as constitutional safeguards can render him. "Every trial involves the exercise of judicial power" and this is vested only "'in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish,' and

it is not pretended that the [military] commission was a court ordained and established by Congress." *Ex parte Milligan, supra,* at p. 121.

The right to a judicial trial of offenses committed by civilians acting as such goes to the essence of our institution:

> "Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. . . . Legislatures and Courts are not merely cherished American institutions; they are indispensable to our government.
>
> "Military tribunals have no such standing." (*Duncan v. Kahanamoku, supra,* p. 322.)

There is wanting in the statutory foundation for the regulation any provision for the usual incidents of a judicial proceeding. No enactments of Congress provides a tribunal to perform the adjudicative function. No provision is made for a hearing in the constitutional sense of notice, confrontation, cross-examination and opportunity to rebut the case against the accused. No procedures are created for judicial review.[7]

The hearing boards created by AR 604-10 are doubly defective. They lack any statutory authorization. They result from a military *tour de force* to act, in the premises of these cases, without authority and in order to adjudicate offenses against rules of conduct that Congress has not enacted. But more important they purport to try people for conduct in civilian life and as such they are

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[7]Indeed, here as below, the government appears to claim that the Army action in determining the charges is not open to judicial review. 243 F. 2d at 617-618.

an ineffectual usurpation of judicial power that must, in this case, be exercised only by constitutional courts.

For all these reasons AR 604-10 as here applied gravely offends the constitutional principal of separation of powers. In these premises it constitutes a menacing invasion of areas heretofore reserved for civilian authority.

Respectfully submitted,

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